

*S. Ja. M' Harg Cred. of
July 10th, 1759 Gillespie
Innerhouse 18th July 1759*

Unto the Right Honourable the Lords of Council and Session,

THE

*9th Decr 1760
Adhore*

PETITION

OF

Redⁿ on the head of M' Harg

JAMES M'HARG of Kiers, and the CREDITORS
of the now deceast JOHN GILLESPIE;
late of Greenhill;

Humbly sheweth,

THAT in the process of reduction, carried on in the name of Mr. Michael Menzies, Advocate, against the petitioners, your Lordships, upon the 29th of June last, pronounced the following interlocutor: 'The Lords having advised the state of the process, testimonies of the witnesses, writs produced, and debate, find the reasons of reduction, of fraud and circumvention, relevant and proven; and therefore reduce the disposition granted by Mary Young, to John Gillespie, and the infestment following thereon quarrelled, and decern accordingly.'

That it is not pretended, any of your petitioners were, in the smallest degree, accessary to the alledged fraud, supposing it proven. On the contrary, they must appear to your Lordships in the most favourable light; your petitioner, James M'Harg, having purchased the lands, which are the subject
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of the disposition now reduced, for a most fair and adequate price, and your other petitioners, avowedly onerous creditors, for money truly advanced to the said *John Gillespie*, upon the faith of his being a fair purchaser, in possession of the lands in question; and therefore they hope they will be forgiven for again laying the cause before your Lordships, and craving an alteration of the judgment, which may, in its consequences, be fatal to your petitioners, by depriving them of a very considerable part of their small incomes.

That as the cause was so lately before your Lordships, the petitioners shall first state the material facts, as they appear upon the face of the deed, or from the proof. *2dly*, They will consider, if the pursuers have brought sufficient proof of their allegations of fraud and circumvention. *3dly*, They will humbly submit to your Lordships, if the interlocutor does not go too far in reducing the deeds *in totum*; especially in a question with fair and onerous creditors, or with a purchaser who stands infest upon the faith of the records; and they will here lay before your Lordships the pursuer's own behaviour in this very action, which must appear so supinely negligent, such *crassa negligentia seu lata culpa, que dolo equiparatur*, as takes away the least pretence of pleading the benefit of a *res litigiosa* in the present question, where the petitioners *certant de damno vitando*.

As to the fact, it is agreed upon all hands, that *Mary Young* was heretrix of the lands of *Greenhill*, and married to *Alexander Renton*, by whom she had several children. It does further appear, that their circumstances were extremely indifferent, their chief fund of credit being these lands of *Greenhill*, which including kains and casualties, at a just conversion, yielded about 1000 merks of rent, and were at the same time burdened with debts contracted by *Mary Young's* brother, to whom she succeeded; and as she and her husband had occasion for money, she applied to *John Gillespie*, the creditor, who accordingly advanced the sum of 2,383 l. 2 s. which



which, with the sums formerly due by the brother, made up 5,333 *l.* 6 *s.* 8 *d.* *Scots*, for which *Mary Young*, and her husband, the 10th of *September* 1720, granted a bond of corroboration, with an obligation to infeft him in a correspondent annualrent, out of the lands of *Greenhill*, and *John Gillespie* was accordingly infeft.

The bond contained the following clause : ‘ And sicklike, ‘ in case it shall happen, that the said *John Gillespie*, and his ‘ forefaids, shall rather desire to have the forefaid sums repaid ‘ to them, than to retain the forefaid security ; then I the said ‘ *Mary Young*, with consent of the said *Alexander Renton*, my ‘ husband, and I the said *Alexander Renton*, for myself, and ‘ as taking burden, &c. binds and obliges us, our heirs, ex- ‘ ecutors, and successors, to pay to the said *John Gillespie*, ‘ and his forefaids, the forefaid principal accumulate sum of ‘ 5,333 *l.* 6 *s.* 8 *d.* *Scots*, and that at the term of *Candle-* ‘ *mas* next, or any other term of *Lammas* or *Candlemas* ‘ thereafter they please, without any requisition to be made ‘ for that effect, with the sum of 1000 *l.* money forefaid, of ‘ penalty and annualrents, from *Lammas* 1720.’

The year following, *Gillespie* was prevailed upon to advance a further sum of 2000 merks, for which, 30th *September* 1721, *Mary Young* and her husband again granted an heritable security upon the said lands of *Greenhill*, in the same terms as the former ; and as they were backward in their payments, *Gillespie* appears to have been under the necessity of obtaining a decret of poinding the ground ; and it also appears, that he was advised to lead an adjudication upon the forefaid bonds in *November* 1723, for the accumulate sum of 8,906 *l.* 6 *s.* 8 *d.* *Scots* : But he never followed out this right by a process of mails and duties, tho’, in virtue of his decret of poinding, of the ground, he uplifted part of the rents from the tenants.

In *September* 1725, he was again prevailed upon to advance 400 merks, for which he obtained another heritable bond ; and it is remarkable, that *Mary Young* and her husband’s circumstances

cumstances were so low at this period, that *Alexander Renton*, the husband, tho' well stricken in years, chose to leave this country and went to *America* to seek his bread, leaving (what was indeed extremely just, when he could have no prospect of ever returning) full and ample powers, dated 21st *August* 1725, to *Mary Young* to manage affairs in his absence; to grant bonds of provisions; to contract debts; to sell and dispose upon the lands in *Edinburgh*, or in the country; to grant dispositions, and other rights and conveyances; to uplift and receive debts, sums of money, &c.

Two years after, *Mary Young* having occasion for money, very probably for the education of her children, prevailed on *Gillespie*, in *January* 1727, to advance to her 1300 merks; and four years after, in *August* 1731, the further sum of 1000 merks, for both which she granted an heritable bond on the said lands of *Greenhill*.

Thus, it appears that, in the beginning of the 1732, the lands of *Greenhill* were incumbered with very considerable debts; and as *Mary Young* had several children, and was of a broken constitution, which did not promise long life, she formed the prudent and wise scheme of selling the lands, paying her creditors, and then dividing the balance of the price amongst her children, reserving to herself the annual rent of the money, during her life: And as this is the transaction reduced by your Lordships interlocutor, it is, at least, a strong ingredient in its favour, that the first offsetting or foundation of the whole, the plan of selling the lands, was a prudent and wise scheme in *Mary Young's* situation; it cannot therefore be supposed to have flowed from any over-persuasion, or undue solicitation.

Nor can it here escape observation, that the petitioners, at this distance of time, labour under very great difficulties in being obliged to explain a transaction to which they were no ways parties; and what is still worse, when all that were concerned in it are dead; and this loss occasioned by the *willful*,
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may, the petitioners will be allowed to suppose, the *affected* delay of this pursuer, who, if he had pleased to have proceeded in the cause in a becoming manner, must have had it in his power to have examined those who only could have thrown light upon it: However, the petitioners must, under all these inconveniencies, state the fact, which indeed they have, in a great measure, learned from the pursuer himself; and particularly from a letter, which he most irregularly kept in his pocket, till the last Council spoke in the cause; but now that it is produced, it is hoped, he will not dispute its being evidence. What the petitioners point at, is the letter to the pursuer, of no latter date than 8th November 1743, writ by *Richard Dick*, writer in *Lanark*, who was the framer of the deed; but who, as well as *Robert Brownlee* his clerk, the writer thereof, are both dead.

It then appears that Mr. *Dick* was the person employed in, and privy to this transaction; nor will it surely be contradicted, that no man of his profession enjoyed to the day of his death a higher character, or more unblemished reputation, of fairness, candour and integrity. In that part of the country where he lived, he was esteemed by all, from the highest to the lowest rank; was employed by them in all their business; and generally trusted by both sides, particularly in making of bargains: A very improper person surely to have been employed, had any thing unfair or *fraudulent* been intended.

Further it appears, that the sale of the lands having been agreed upon; *John Gillespie*, the purchaser, upon the one part, and Mr. *Renton*, *Mary Young*'s eldest son and heir, upon the other part, came to Mr. *Dick*, and informed him of the terms of agreement, which were in general, that the lands should be sold for 19,600 merks, about 20 year's purchase of an estate which held of a subject superior; and it is very material to observe, that with regard to the sum due to *John Gillespie*, the calcul was intirely left to Mr. *Dick*, who must there-

fore have had before him sufficient *data*, from which he struck the balance to be 14,000 merks due to *Gillespie*.

Mr. *Dick* accordingly drew out the disposition, and went to *Greenhill* where *Mary Young* lived, where he *communed* with her, acquainting her what directions he had received from Mr. *Gillespie* and her son, and then *read* over the disposition itself to her, with which she being fully satisfied, to use Mr. *Dick*'s own words in his letter, *She signed it without any hesitation.*

But this is not all, for it further appears, that *Mary Young* was so far of a *disposing mind*, and sensible of the transaction, that, of the same date with the disposition, she executed a deed, distributing the balance of the price amongst her children. The directions for this deed, which varied a former one granted seven years before, when her family was in a different situation, could only have been given by herself to Mr. *Dick*, who, had he been alive, could have explained all this matter; but it does appear, that this deed was wrote by *Brownlee*, in *Greenhill*, and carefully read over to her before she signed it, before Mr. *Dick* and Mr. *Brownlee* as witnesses, which is proved by the only living witness that was then present, to wit *Marion Lockhart*, P. 12, printed state, who depones, ' That on the day the lands were said to be sold there
' were no men with Mrs. *Renton*, so far as the deponent can
' remember, but *John Gillespie*, *Richard Dick*, *Robert*
' *Brownlee*, and *Alexander Renton* her son; that said *Brown-*
' *lee* went up stairs, and wrote papers, and brought them
' down, and read them at Mrs. *Renton*'s bed-side, but she
' does not know whither they were signed or not.' Now as the disposition, being a paper of length and form, was according to Mr. *Dick*'s directions, writ out in his own chamber at *Lanark*, the paper writ by *Brownlee* in the house could be no other than the deed of provision; and tho' *Mary Lockhart* did not see it signed (which is noways surprising, as she could not be a signing witness) yet it now appears regularly executed, and the petitioners cannot help observing, that
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Mary Young's subscription to it is extremely clean and well wrote, and has noways the aspect of the subscription of a woman in the near prospect of death, or in such an insensible situation as the pursuer endeavours to represent her.

It is needless here minutely to recapitulate the terms of the bargain, so fully laid before your Lordships in the former proceedings: In the general, after allowance of the debts due to *Gillespie* himself, which, by *Mr. Dick's* calculation, amounted to 14,000 merks, and 700 merks which were immediately payable; the overplus of 4900 merks, which was to be a burthen upon the estate, was appointed to remain in the purchaser's hands, as an alimentary fund to *Mary Young* herself during her life, in the manner therein set forth, the capital to be divided amongst her children at her death; and upon this disposition *John Gillespie* was regularly infest, and entered into possession, except of a certain part which was reserved to *Mary Young*, to answer the interest of part of the money.

Mary Young continued to live upon the lands of *Greenhill*, without expressing any dissatisfaction with the bargain, or complaining of any injury having been done to her by the purchase; but in the 1742, *Alexander Renton*, the husband, very unexpectedly returned from *America*, and was, it would appear, advised to bring an action of reduction of the foresaid bargain, in his own and his wife's name. This action moved with a very slow pace from the 1742 to the 1747. One thing is clearly evident, that this pursuer, who has informed your Lordships that his father was first cousin to *Mr. Renton*, was from the beginning their chief or only adviser; accordingly, he early inquired at *Mr. Richard Dick* into the circumstances of the case; and in the 1747, Lord *Arniston*, then Ordinary in the cause, having pronounced an interlocutor, 'Repelling the
' reason of reduction founded upon an objection in law, with
' regard to *Mary Young's* powers of disposing of the estate in
' her husband's lifetime;' not only this interlocutor was acquiesced in, but tho' an act for proving had once been allowed, it
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was thereafter stopped, and the parties allowed, upon a representation, a further hearing of the cause; yet this proof was no more insisted on; the cause was deserted, and allowed to sleep.

And the petitioners will be allowed to suppose, that this could be owing to nothing but a consciousness, or rather conviction upon the part of the pursuer, from his conversation and correspondence with Mr. *Dick*, that his allegations of fraud were altogether without foundation.

Such, at least, was unfortunately the sentiments of some of your petitioners, particularly one of them, who lent a very considerable sum to *Gillespie* upon heritable security, in the 1749, by the advice and direction of his brother-in-law, Mr. *Dick*; which is observed as real evidence of Mr. *Dick*'s sense of the fairness of the bargain, and may be allowed to be urged as evidence, when the pursuer has thought proper to forbear his process till Mr. *Dick* and the other material witnesses are dead. In this interim, *John Gillespie* became bankrupt, and his estate of *Greenhill* being conveyed to a trustee for the behoof of his creditors, in the 1752 infestment was taken upon this trust right, and the estate was sold by public roup to *James M'Harg*, your petitioner, for 30,000 merks, who found it convenient again to dispose of them in the 1756; and then it would appear, that Mr. *Menzies* took up the conceit of reviving the former process, which had now slept for nine years; probably being excited to it from the high price which lands now give in this part of the united kingdom, and which it was expected would be given by a noble Duke, to whose estate these lands of *Greenhill* lye contiguous; accordingly the process was awakened in September 1756, by Mr. *Menzies*, as trustee in consequence of a disposition by *William Renton*, second son to *Mary Young*, in May 1747, and Mr. *Menzies*'s backbond relative thereto in June following.

The petitioners will, in the sequel, submit to your Lordships, a few observations upon the management of this process;

cess; but these are the facts which appear necessary to lay before the court, and they shall therefore now proceed to the 2d head proposed. To consider the evidence of the fraud and circumvention urged by the pursuer; as that is the foundation of your Lordships judgement.

And in the first place, the petitioners shall admit, that at the time of executing the disposition, *Mary Young* did labour under a disease of body, which is surely no reason of reduction of a deed, when the person appears to be of a *disposing mind*, which the pursuer's Council candidly admitted in their argument; and indeed they could not do otherways, as there is not the least evidence of her judgement or capacity being any how affected; the witnesses who attended her prove the contrary: Thus, *Mary Lockhart*, P. 12, depones, 'That she never saw any instances of her want of sense;' and *Mary Fakonar* depones, P. 15, 'That she never observed any mark of want of sense in her, but at the time spoke of her head being in a low, as above;' a circumstance which the pursuer attempted to lay great stress upon, and the petitioners have therefore fairly set it down, to show that it directly proves the contrary; for the fact was, that during her sickness, the witness last mentioned having one night put a warm blanket about *Mary Young's* head, on feeling the heat, she used the expression above-mentioned, which was extremely natural. But this evidence of her capacity is *ex super abundanti*, as there is no proof of the incapacity brought by the pursuer, upon whom it is incumbent to prove his issue.

Further, as she was no ways incapable of understanding what she did, so it appears from Mr. *Dick's* letter, already stated to your Lordships, that he conversed with her, read over the disposition, and she approved thereof. It was indeed insisted that the orders for writing out the disposition were not given by herself, but by *Gillespie* and her son *Alexander*; which may be extremely true, and yet can be no qualification of any fraud or imposition. As Mr. *Dick* lived at *Lanark*,
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about eight miles distant from *Greenhill*, it was very natural to send directions by her own son, in company with *Gillespie*, the other party. But then, Mr. *Dick's* afterwards explaining the deed to her, and particularly relating what had passed betwixt him and her son, and her thereupon signing the deed, was a direct approbation of her son's conduct, or rather a declaration that what he had done was by her order; especially, as at this very meeting, another deed was made out, settling the provisions of her younger children, which could only be done by her own direction, and proceeded upon the plan of the disposition. Nor is it possible for the petitioner to lose sight of Mr. *Dick's* unblemished character, which puts him above suspicion of having joined in any fraud or imposition, which yet must be supposed before the least weight can be given to the pursuer's argument, against whom indeed every thing will be presumed, when, by his own delay, the petitioners have lost the benefit of Mr. *Dick's* evidence.

The pursuer, sensible of the lameness of his proof, upon this point, resorted to an artificial argument, that *Alexander*, the son, was in confederacy with *Gillespie* to deceive his own mother; a tale, in itself improbable, and unsupported by evidence. It is true, that in the division of the balance of the price a greater sum was given to him than to any of her other children; but this is noways surprising, when it is considered that *Alexander* was her eldest son and heir, who would have succeeded to her lands of *Greenhill*, had they not been sold; and therefore, it was extremely natural to give him a larger share: And accordingly, upon the same plan, this very pursuer, Mr. *Menzies*, by his backbond, in 1747, is bound out of the money that he should recover, to pay to *Alexander* a much greater proportion than was appointed by this deed, or is given to any other of the children.

It was also said, that *Gillespie* had advanced 500 merks to *Alexander*, and it is extremely true, that, some months after the disposition, *Alexander* having occasion for money, applied

to *Gillespie*, who did advance him 500 merks upon his obligation; and as this sum was to bear annualrent, it was very natural for *Gillespie*, who was to retain the balance of the price during *Mary Young's* own lifetime, to assist her son with a little ready-money, when he was afterwards sure of the fund of his payment. But how such a transaction should prove so unlawful and fraudulent a confederacy, as the pursuer is now pleased to alledge, does not appear.

The petitioners, therefore, do humbly contend, that the general principle, that a deed is presumed to be regularly executed, and all the necessary steps taken, not only remains unimpeached by any evidence brought on the part of the pursuer, but is also supported by the best evidence that now can be had of the *res gesta*, viz. Mr. *Dick's* letter to the pursuer himself, and the other circumstances; and as this letter is so often mentioned, the petitioners beg leave to lay it in its own words before the court.

‘ I came home only this morning, when I found your letter,
 ‘ otherways would have answered it before now. I thank
 ‘ you for your civility in acquainting me that I am much load-
 ‘ ed in the condescendance that was to be given in of the facts
 ‘ of lesion, fraud, and circumvention alledged in the transacti-
 ‘ on and sale of the lands of *Greenhill*. At the same time,
 ‘ I was noways concerned, nor present at the sale, till Mrs.
 ‘ *Renton's* son and *John Gillespie* came down to *Lanark* and
 ‘ told me of it, and desired me to make a calcul of the debts,
 ‘ and state the balance, which I did, and then to draw a dispo-
 ‘ sition, and come to *Greenhill* and get it signed. In a little
 ‘ time after I drew the disposition, and went to *Greenhill* with
 ‘ it; and after communing with Mrs. *Renton*, and relating
 ‘ what was represented to me by her son and *John Gillespie*,
 ‘ she was satisfied, and after reading the disposition, signed it
 ‘ without any hesitation. I told you all these things before,
 ‘ when I saw you last at *Edinburgh*. And if any body shall
 ‘ unjustly

‘ unjustly load me, I will endeavour to vindicate myself, and
 ‘ make them sensible of it. I am, &c.

Lanerk, 8th November, 1743.

The case then so standing, the argument which the pursuer attempts to draw from an alledged *lesion* in the bargain, or inequality in the price to the value of the subjects sold, is altogether inconclusive; for first, in the general, the petitioners are advised that an inequality of price is no cause of reduction of a bargain, by the law of *Scotland*: The maxim in the *Roman* law, *lesio ultra dimidium*, does not apply in the law of this country. And indeed the pursuer’s argument appears extremely inconsistent with the common methods of proceeding; for, by wheeling in a circle, he endeavours to prove fraud and circumvention from the lesion; and to prove the lesion from alledged circumstances of fraud and circumvention. The petitioners have already endeavoured to show your Lordships that there was no fraud nor undue practice used in obtaining, or executing the disposition, under challenge; but that it was the serious and deliberate act of *Mary Young*, the disponent; they shall now, supposing, tho’ not admitting, the objection of lesion to be at all relevant, endeavour to show your Lordships that the facts upon which this lesion is pretended to be founded are extremely defective.

Thus it is agreed that the price stipulated to be paid was 19,600 merks for these lands of *Greenhill*, which held of a subject superior, and which yielded only of yearly rent, including kains, and carriages, 1000 merks; for that those kains and casualties, together with several parcels of land, reserved out of tenants tacks, which the pursuer has indeed attempted to raise to a higher pitch of value, were really worth no more than 200 merks, is proved by the bargain itself; allowing these kains and casualties, &c. to be enjoyed, and possessed by *Mary Young*, as corresponding to the interest of 4000 merks, which, at the highest interest of 5 per cent, is precisely 200 merks.

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It is therefore apparent that the price, exclusive of what was to be paid by the subject superior, was, to a trifle, 20 years purchase of the lands, and it is believed that, 30 years ago, at the date of that purchase, estates in *Scotland* were sold at as easy a rate. It is true, that since that time, and particularly within these few years past the value of lands has greatly increased in *Scotland*; and it is believed that this increase of price is the temptation which has induced the pursuer to insist in this cause: But your Lordships cannot form any judgement of an adequate price of lands 30 years ago, from what either these lands, or any others in the country may give at this day; and therefore the petitioners will not tire your Lordships in particularly examining some of the instances where the pursuer has endeavoured to prove that lands lately yielded a higher price, because, in their humble apprehension, these instances appear clearly not to the purpose.

It is true, the pursuer has endeavoured to prove by one witness, Mr. *Colquhoun*, that he, at desire of his uncle, Mr. *Lockhart* of *Cleghorn*, offered 24 years purchase for *Greenhill*; but it also appears, that *Mary Young* gave very little attention to said offer, if any such was truly made; that being dissatisfied in some previous dealings with that gentleman, she declined having any further concern with him; and therefore notwithstanding Mr. *Colquhoun's* deposition, the petitioners will be permitted to doubt if this bargain would have proceeded, or if Mr. *Lockhart* would have given so high a price for the lands. It is no ways an uncommon case in some people to make offers, when they don't expect they will be accepted of, as it is always easy, upon frivolous pretences and objections, to break off a communing of that nature; and there are also people in the world, not over remarkable in forwarding bargains of that kind, and who sometimes intangle the seller in the preliminaries of a bargain, and then prevent the execution or final completion by subtilties of law, objections to a progress, and such like; the consequence of which, in

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this case, would have been the ruin of *Mary Young*, as she was undoubtedly so much incumbered with debts, which made it far the surest and safest way for her to sell, at a reasonable price, the lands to *John Gillespie*, preferable to any other purchaser.

The pursuer further insisted, ' That there appeared great lesion, in regard that 14000 merks was declared to be due to *John Gillespie*, when truly a less sum was owing.'

But in the first place, your Lordships will remember, that from Mr. *Dick*'s letter it appears, the making up of this calculation was intirely the work of Mr. *Dick* himself, which shows that it was fairly intended; for if any deceit had been meant, *Gillespie* would surely not have left this calculation or arithmetical operation to Mr. *Dick*. It proves that *Gillespie* truly wanted to have it fairly made up; and no doubt, had Mr. *Dick* been examined as a witness in his life-time, he could have explained the matter.

But further, there appears no injustice in the calculation; for, though the petitioners are at a very great loss in thus explaining a transaction to which they were no parties, nay, when all the parties to the transaction are now dead; yet allowing all *Gillespie*'s intromissions with the rents, that are proven against him, the 14000 merks, to a trifle, appear to have been due; for the petitioners cannot allow that the evidence of witnesses is to be admitted, where they depone, that they heard of a person lifting rents from another, especially, when it cannot be supposed, that in consequence of his decret of poinding the ground, *Gillespie* would levy more than corresponded to the interest of his money. Intromission with rents is capable of proof *scripto*, by the receipts, or at least, by the oaths of the tenants who paid their rents, but hear-say or conjectural evidence merits no attention. And supposing *Gillespie* did intromit with a sum equal to his whole annual rent, the variation in the accoimt would be but inconsiderable, as the

the principal, deducing all accumulations and penalties of *Gillespie's* debt, amounted to no less than 12,700 merks.

The petitioners do therefore, with the greatest deference, submit to your Lordships, if there is sufficient evidence in this cause for supporting the interlocutor reducing the disposition and infeftment following thereupon, upon the head of fraud and circumvention. But supposing, what they humbly hope will not be the case, your Lordships should continue of opinion that the transaction was improperly or unduly conducted; the petitioners will now beg leave, in the last place, to state some observations why the disposition and infeftment following thereupon, ought not to be reduced *in totum*, as is found by the interlocutor.

For your Lordships will remember, that the question here is no ways with *Gillespie*, the original purchaser; it is truly with his onerous and *bona fide* creditors, and with your petitioner *James M'Harg*, who purchased those lands at a public roup from the trustee for *Gillespie's* creditors; and your Lordships will also be informed, that of these creditors, two are infeft in security of their debts, one in the 1746, and the other in 1749. What the petitioners therefore humbly intend by this argument is, that as the pursuer founds his chief argument upon an inequality in the price, whether arising from an erroneous calculation of *Gillespie's* debts, or from the lands being too low valued, these are errors and imperfections in a bargain, which can, and may be rectified, without reducing the bargain itself. Taking the matter in the strongest light for the pursuer, the *lesion* in this respect is not great; and if it is possible to do justice to all parties by permitting the bargain to stand, it appears most agreeable to the maxims of equity to follow that rule.

The petitioners shall suppose this action to have been timeously brought, and properly insisted in, by *Mary Young* herself. Surely she could not complain if your Lordships decreed to her full reparation of what she had suffered by the inequality of the bargain, and would not listen to her further insisting.

sisting that the whole bargain should be reduced, to the prejudice of fair, just, and onerous creditors, in order to her making a profit by the increase of the value of lands, from the period in which the original purchase was made; for this is truly grasping at an undue advantage, *quod bona fides non patitur*. The Roman law, so famous for its equity in cases of this kind, where there was no fraud in the bargain itself, where *dolus non dedit causam*, but that there appeared an inequality in the price, gave the proper remedy by the *actio quanti minoris*; and it can never be equitable to carry the remedy further than to redress the wrong.

In the present state of the case, the petitioners shall allow, and surely no greater concession can be demanded, that both parties *certant de damno vitando*; nay, they shall further suppose (what they cannot admit) the case of *Mary Young* to be more favourable than theirs, or, in the legal terms, to have a *preferable right in equity*; but then, this equitable right can never be stretched further than to repair her damage; that is, in other words, to make up the price so far as it appears to have been too low: but then when she has thus recovered her damage, the remainder must be left to be divided among the other *bona fide* creditors.

To push it further, is, as the petitioners have already said, to grasp at an undue advantage; *lucrum captare ex alterius jactura*. This enquiry will not permit, which justly repairs the damage of a party, but will never allow them to catch at gain or profit to the prejudice of another onerous creditor.

The equity of the petitioners claim appears still in a stronger light, when the circumstances of the case are considered; that they lent their money in a great degree upon the faith of the records, from which it appeared, that *Gillespie*, their debtor, stood infest in these lands, without any challenge from *Mary Young*, for 10 years after the purchase.

It is true, that after the husband's return from *America*, she was, in 1742, persuaded to undertake this litigation; but then, tho'

tho^t the cause was conducted by no less able council than this pursuer, who has now accepted a trust right, yet it was carried on in so slovenly a manner that it merited no attention; and at last, in *January* 1748, was permitted to sleep, and in that state it continued till 1756; and it was in this period, when the process was asleep, that one of your petitioners, who is secured by infestment upon the estate, lent his money; and during the same period, the estate was sold by public roup, without any challenge from any mortal, for behoof of the creditors; nor can the petitioners help repeating an observation formerly made, That it would appear the process was carried on in this slovenly manner, from a belief that the claim was without foundation; as it appears, that the pursuer himself was acquainted with the circumstances of the case, as early 1743, by Mr. *Dick*, the only person who indeed could give evidence thereof; and the petitioners are the more confirmed in this opinion, by the pursuer's taking a judgement in a point of law from the Lord Ordinary, acquiescing in it, and then permitting the cause to lye over, without even obtaining an act for proving, for the act was not pronounced till the 1757, long after Mr. *Dick* and *Brownlee* his clerk, the most material witnesses, were both dead.

The pursuer is so sensible of the objections in equity arising from this conduct, that he, over and over again, has told your Lordships, that this supine negligence and unaccountable delay was owing to his being absent in England, about necessary affairs. What these were he has not told your Lordships; but your petitioners have heard, that it was a very unnecessary piece of business he was employed in, and very foreign to his profession; consequently, when the creditors are thus struggling to recover payment of their debts, and if it appears that any prejudice has arisen from the most extraordinary conduct of the process, they may fairly insist that these delays should affect the pursuer, those who from an opinion of his skill in the law,

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and diligence in prosecuting their right, have entrusted him; and not these petitioners who have no connection with him.

But this leads the petitioners to lay before your Lordships a point not hitherto fully stated, to wit, what is the affect of the interlocutor, as it now stands, with regard to these petitioners; particularly, how far it can affect the creditors, or even the disponees from *John Gillespie*.

The petitioners hold it to be a principle of the law of this country, as well as of the *Roman* law, *quod dolus auctoris non nocet successori*, for this they beg liberty to refer to Lord *Stair's* Fol. 78, and the cases therein quoted; and more particularly, to all the statutes of fraud, the acts 1621, &c. where this distinction is uniformly followed, by distinguishing between the supposed committer of the fraud, and the fair, onerous purchaser from him.

The petitioners are advised, that as *John Gillespie* was infest and in possession, there can be no foundation for giving a preference to this pursuer, except upon the pretence that by the process the question became a *res litigiosa*: But to this the following answers are humbly submitted: *no*, As the records are the boasted security of this nation, upon which creditors and purchasers are to rely; and as the statutes have, at different times, introduced various registers, which purchasers or creditors are obliged to look into; the petitioners most humbly contend, that when a person appears upon the record to be infest, and when, from the other records, there appears no legal diligence, no incumbrance, nor any other bar whatever to his disposing of the property, or borrowing money to affect it, a creditor or even a purchaser is, *in optima fide*, to deal with him; and, upon getting prior rights affecting these lands, they are safe from being affected by any consequences arising from a personal challenge against their author. Supposing a summons executed against him, or some steps taken in a process, yet, such challenge does not appear upon the face of any record; and the case is still stronger when the process is managed

managed in the most slovenly and negligent manner, is deserted and allowed to sleep, which may not improperly be said to be putting it out of court, as it cannot be revived without executing a fresh summons; and in fact it was during this period, that even some of the heritable debts were contracted, and that the estate was sold.

The petitioners are advised that it is common, and ordinary to search the records, and when such search is made, persons think themselves daily in safety to lend their money, or to purchase land, without rummaging into the clerks offices in order to discover if any personal challenge has ever been brought against their author: To the petitioners the consequences appear very disagreeable, for it is not only difficult, but truly impossible to discover, with any accuracy or precision, what processes may have been called and brought into court. If the pursuer denies the truth of the observation, the petitioners are ready to verify it from daily practice, that processes cannot be found, which it is certain once depended; how much more difficult, by a search to discover whether ever a process depended against any person for 40 or 50 years back; and, as no doubt a process may sleep, and be awakened in the 39th year, what man can be sure of his property? Thus, in this very case, the pursuer allowed the process to lye over for nine years; and had he taken up some further project of a new species of a wind-mill or a water-mill, and so amused himself with his own imaginations for 30 years more, and then pleasing to return to his former profession, awakened the process after the estate had gone thro' 20 different hands, he might have pled the very argument that is now urged against the petitioners, for reducing the original disposition, and recovering the estate: Nor does the doctrine pled for the petitioners, at all affect the rights of any party, acting in a legal and regular manner, for the law gives a remedy to secure the rights competent upon a personal challenge against alienations of the property, by the possessor of the estate, for this pursuer might have raised inhibition upon his depending process, which

which, by law, must be recorded in the proper register for the certification of the lieges, and then indeed, if any person purchase *spreta auctoritate*, the undoubted consequence is, that his right must fall to the ground. The pursuer's argument gives the same force to a sleeping process, that the law has given to the legal and compleated diligence of a registered inhibition; the pursuer therefore must impute to his own negligence in not following the method that the law has chalked out for securing to him the effects of a personal challenge against *Gillespie*; but the petitioners, who all stand in the light of onerous, and *bona fide* creditors cannot be affected by this misconduct of the pursuer, let him assign, by way of excuse, negligence, *juris ignorantia*, absence in *England*, or what other cause he pleases.

But, in the second place, the petitioners must, on this head, submit to your Lordships, this separate consideration, whether, where the benefit of a defence arising from a *res litigiosa* is pled, it is not a good answer, that the person pleading it has been *in mora*, and has not conducted his process in a regular manner, and with becoming dispatch, and therefore cannot take any benefit from it, against a *bona fide* creditor, competing with him.

The petitioners will not trouble your Lordships in recapitulating the unaccountable methods in which the process was conducted; they were formerly before the court, and have in a great measure been already stated in this petition. They are persuaded that the pursuer himself will not controvert its having been carried on in a very slovingly manner from 1742, to *January* 1748, when it was *deserted* till the 1756; and therefore they are intitled to subsume that, as great a *mora* appeared in this cause as ever occurred in any instance.

And the point of fact being thus established, the petitioners do humbly maintain, in point of law, that the plea of *res litigiosa* ceases, where there is an evident *mora* upon the part of the person who would take an advantage of it; because, where such *mora* occurs, there is no *mala fides* upon the
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the part of the creditors or purchaser from the defender in the action. The law turns the tables, and presumes a *mala fides* in the negligent pursuer, and will not permit him to argue from his own *culpa*, to distress a fair creditor. Your Lordships have, in many cases, even of legal and public diligence, decided upon these principles. Thus, though the denunciation of apprising makes the subject litigious, after which the debtor cannot make any voluntary alienation in prejudice of the apprising, yet if the appriser does not proceed in his diligence, your Lordships decided that by his being *in mora*, the effect of the litigiousness ceases. 23^d July, 1674. *Johnston contra Johnston*. And in the same manner, where a debtor had disposed his lands, after leading the comprising, but before infeftment, your Lordships refused to reduce the disposition, in respect that six years had intervene'd betwixt the apprising and the infeftment; 21st July, 1627. *McCulloch contra Hamilton*. And many other judgments could be mentioned to the same purpose. When a *mora* upon the part of an appriser, or other user of a legal public diligence, can thus bar this exception of *res litigiosa*, surely the pursuer's case is still more favourable on the part of the petitioners, where the process was merely a personal challenge, and where such process has been deserted in the manner so often mentioned. What effect it might have against the original defender it is not the petitioner's business to enquire; they only maintain that with regard to them who are no parties it can have no effect; it must be considered to be out of court, and as if it never had been brought.

And if your Lordships are of opinion for the petitioners in this point of law, it will remain to enquire what effect it has in the present case: Surely, at least, the heritable creditor, who lent his money, and the purchaser, who bought the lands, after the process was deserted, and fallen asleep, will be preferred. But your Lordships will also be informed, that in this period, *viz.* in the 1752, *Gillespie* granted a disposition

for behoof of his creditors, to a trustee, who was thereupon infest. This created also an heritable right in favours of the other creditors; and then the matter must be considered in the same light, as if Gillespie, of the date of the trust disposition, had granted to them heritable securities, and so they are intitled to argue upon the *mora* upon the part of the pursuer, and to insist, that their infestments must stand good and be effectual against the consequences of this process of reduction; and though it may be questioned, if your Lordships interlocutor has expressly decided this last point, yet the petitioners thought it their duty to state it, that the whole cause may be before the court.

It remains only for the petitioners, to beg your Lordships excuse for so long a paper, but the anxiety, especially of some of them, who have a great share of their all at stake, will, 'tis hoped, plead their forgiveness. With a view to your Lordships time, they have omitted mentioning sundry particulars, and rather risked some obscurity, because the cause was so lately and so fully before you.

May it therefore please your Lordships to review your former interlocutor, and to find the reasons of reduction not proven, and to assoilzie the defenders. At least, 2do, to find, that the disposition and infestment following thereupon, cannot be reduced in totum, but only in so far, as to give Mary Young and her disponees access to reparation against the lesion which she has suffered from the inequality of the price. And 3tio, et separatim, to find, that the petitioners contracting with John Gillespie, upon the faith of the records, or in this circumstantiated case, are preferable to the pursuer, who is not intitled to plead a res litigiosa against them.

According to justice, &c.

RO. DUNDAS.

